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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

In re M.B., a Person Coming Under the
Juvenile Court Law.

B234400
(Los Angeles County
Super. Ct. No. JJ18977)

THE PEOPLE,

Plaintiff and Respondent,

v.

M.B.,

Defendant and Appellant.

APPEAL from an order of the Superior Court of Los Angeles County, Tamara Hall, Judge. Affirmed as modified.

Kevin D. Sheehy, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Michael R. Johnsen and Allison H. Chung, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

The District Attorney of Los Angeles County filed an amended petition alleging that 13-year-old defendant and appellant M.B. came within the provisions of Welfare and Institutions Code section 602 because he committed the attempted murder of Anacleto Covarrubias (Pen. Code, §§ 664/187, subd. (a)¹), personally inflicted great bodily injury on Mr. Covarrubias in the commission of the attempted murder (§ 12022.7, subd. (a)), and assaulted Mr. Covarrubias by means likely to produce great bodily injury (§ 245, subd. (a)(1)). The juvenile court found the allegations true, declared defendant to be a ward of the court, and ordered defendant suitably placed at an open facility with a maximum period of physical confinement of 13 years.² Defendant's maximum period of physical confinement consisted of a nine-year period for his attempted murder adjudication (§§ 664/187, subd. (a), Welf. & Inst. Code, § 726, subd. (c)), a consecutive three-year period for his great bodily injury enhancement in connection with the attempted murder adjudication (§ 12022.7, subd. (a)), and a consecutive one-year period for his assault by means likely to produce great bodily injury adjudication (§§ 245, subd. (a)(4), 1170.1, subd. (a)). On appeal, defendant contends that the consecutive one-year maximum period of physical confinement for his assault adjudication must be stayed pursuant to section 654. We agree with defendant, and order the juvenile court's adjudication order modified accordingly.

BACKGROUND

About 9: 37 p.m., on May 31, 2011, Anthony Bailey was waiting for a train at the base platform of the Willow Blue Line train station in Long Beach. Mr. Bailey saw a number of youths running toward him—two or three were running on the train tracks and

¹ All statutory citations are to the Penal Code unless otherwise noted.

² The adjudication hearing also concerned 12-year-old J.Y, defendant's co-defendant, on allegations of attempted murder and assault by means likely to produce great bodily injury. J.Y.'s adjudication is not part of this appeal.

two or three others were running on the platform. Mr. Bailey heard the youths laughing and speaking to one another about having beaten someone. Mr. Bailey thought it was unusual for the youths to be on the tracks and positioned himself to see if there was anything on the tracks. Mr. Bailey saw Mr. Covarrubias on the tracks and went to help him. As Mr. Bailey approached Mr. Covarrubias, he saw one of the youths jump down and kick or stomp on Mr. Covarrubias twice. It appeared to Mr. Bailey that the youth was not trying to kick Mr. Covarrubias hard or with any real force—that the youth was not “giving it his all.” When he reached Mr. Covarrubias, Mr. Bailey determined that Mr. Covarrubias was unconscious and had “pretty severe” head injuries. Mr. Bailey was unsuccessful in his attempt to lift Mr. Covarrubias onto the platform which was about four or four and a half feet above the tracks, and instead moved him off the tracks and out of the path of any oncoming trains. After summoning help, Mr. Bailey remained with Mr. Covarrubias until the paramedics and police arrived.

Los Angeles County Sheriff’s Department Detective Michael Shaw obtained a surveillance video of the inside of a train traveling north to the Willow Blue Line train station on May 31, 2011, and a surveillance video of the platform at the Willow Blue Line train station. The surveillance video of the inside of the train showed Mr. Covarrubias enter the train and sit down. At some point, minors E.H., R.S., J.Y., and E.P. boarded the train and sat near Mr. Covarrubias. Later, defendant boarded the train and stood with R.S. and J.Y.

At some point, the video showed Mr. Covarrubias waving his arms and apparently arguing with various members of the group of minors. J.Y. and Mr. Covarrubias stood face to face. J.Y.’s left hand was in a fist position, and he hopped slightly from left to right in an aggressive manner. Two male train passengers intervened and appeared to try to calm J.Y.

At the Willow Blue Line train station, Mr. Covarrubias walked to the front of the train and exited the train. E.H., R.S., E.P, and J.Y. looked in Mr. Covarrubias’s direction as he got off the train. The minors and defendant followed Mr. Covarrubias off the train. The train station platform surveillance video showed the minors approach Mr.

Covarrubias. Mr. Covarrubias walked away, stopped, and turned around. The minors again approached Mr. Covarrubias. This time, E.H. threw Mr. Covarrubias onto the train tracks. Defendant, J.Y., and R.S. jumped from the platform onto the tracks. Mr. Covarrubias lay motionless. R.S. kicked Mr. Covarrubias. Defendant kicked Mr. Covarrubias twice.

Detective Shaw interviewed J.Y. J.Y. said that he was riding on the train with his friends, R.S. and defendant, when Mr. Covarrubias kicked J.Y.'s chair. J.Y. and Mr. Covarrubias argued. J.Y. lost his temper and wanted to fight Mr. Covarrubias. J.Y. stood up, and other passengers on the train had to intervene. Detective Shaw also interviewed defendant and showed him photographs of the person stomping on Mr. Covarrubias as he lay on the train tracks. Defendant identified himself as the person in the photograph who stomped on Mr. Covarrubias.

J.Y. testified that he was on the train with R.S. and M.B. M.B. boarded the train one station after J.Y. and R.S. J.Y. met the other two, older minors on the train or just before getting on the train. According to J.Y., Mr. Covarrubias was intoxicated and bothering passengers on the train. Mr. Covarrubias became angry when one of the minors J.Y. did not know spoke to Mr. Covarrubias in Spanish. J.Y. told Mr. Covarrubias to calm down. Mr. Covarrubias responded, "Shut up, you stupid little kid," which started "the whole altercation."

Defendant testified that he boarded the train alone. J.Y. and R.S., defendant's schoolmates, were already on the train. Defendant, J.Y., and R.S. had spent the day together at the beach. They got off the train together at the Willow Blue Line train station. The other two minors also got off the train, one of whom said he was going to beat up Mr. Covarrubias. The older minor who said he was going to beat up Mr. Covarrubias pushed Mr. Covarrubias from the train platform. Defendant was "stunned" and "astonished" when Mr. Covarrubias was pushed from the platform. About two minutes later, R.S. and defendant jumped from the platform. Defendant wanted to check if Mr. Covarrubias was alive or dead. R.S. kicked Mr. Covarrubias twice. Defendant lightly "stomped" on Mr. Covarrubias's back twice to see if he was alive. Upon hearing

Mr. Covarrubias make a noise, defendant ran down the tracks. With respect to the manner in which he came in contact with Mr. Covarrubias, defendant stated that he first said that he lightly stepped on and not that he stomped on Mr. Covarrubias.

On June 9, 2011, Detective Shaw visited Mr. Covarrubias at the hospital. Mr. Covarrubias's head had numerous lacerations, a large scar from surgery, and about 34 staples. A portion of Mr. Covarrubias's skull had been removed to relieve swelling in his brain. Mr. Covarrubias was unable to feed himself at that time and was being fed through a tube in his nose.

DISCUSSION

Section 654 Bars Punishment For Defendant's Assault Adjudication

Defendant contends, pursuant to section 654, that his maximum period of physical confinement may not include a consecutive one-year period for his assault adjudication because the conduct underlying his attempted murder and assault convictions was the same. Because section 654 proscribes double punishment for the same act or an indivisible course of conduct, the one-year maximum period of physical confinement for defendant's assault adjudication must be stayed.

A. Standard of Review

“‘The question whether [Penal Code] section 654 is factually applicable to a given series of offenses is for the trial court, and the law gives the trial court broad latitude in making this determination. Its findings on this question must be upheld on appeal if there is any substantial evidence to support them.’ ([*People v.*] *Hutchins* [(2001)] 90 Cal.App.4th [1308,] 1312.) The court's findings may be either express or implied from the court's ruling. (See *People v. Blake* (1998) 68 Cal.App.4th 509, 512 [80 Cal.Rptr.2d 308].) In the absence of any reference to Penal Code section 654 during sentencing, the fact that the court did not stay the sentence on any count is generally deemed to reflect an implicit determination that each crime had a separate objective. (See, e.g., *People v. Blake*, *supra*, at p. 512; *People v. Osband* (1996) 13 Cal.4th 622, 730-731 [55

Cal.Rptr.2d 26, 919 P.2d 640].) “‘We must ‘view the evidence in a light most favorable to the respondent and presume in support of the [sentencing] order the existence of every fact the trier could reasonably deduce from the evidence. [Citation.]’ [Citation.]” [Citation.]’ (*Hutchins, supra*, 90 Cal.App.4th at pp. 1312-1313.)” (*People v. Tarris* (2009) 180 Cal.App.4th 612, 626–627.)

B. Application of Relevant Principles

Section 654, subdivision (a) provides, in pertinent part, “An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision.” “In *Neal v. State of California* (1960) 55 Cal.2d 11 [9 Cal.Rptr. 607, 357 P.2d 839], [the Supreme C]ourt construed the statute broadly: “‘Section 654 has been applied not only where there was but one ‘act’ in the ordinary sense . . . but also where a course of conduct violated more than one statute and the problem was whether it comprised a divisible transaction which could be punished under more than one statute within the meaning of section 654.” [Citation.] [¶] Whether *a course of criminal conduct* is divisible and therefore gives rise to more than one act within the meaning of section 654 depends on the *intent and objective* of the actor. If all of the offenses were incident to one objective, the defendant may be punished for any one of such offenses but not for more than one.’ (*Id.* at p. 19, italics added.)” (*People v. Rodriguez* (2009) 47 Cal.4th 501, 507.)

Defendant contends that his conduct in stomping on Mr. Covarrubias as he lay on the train tracks was the identical conduct that underpinned his adjudications for attempted murder and assault by means of force likely to produce great bodily injury. Thus, defendant argues, section 654 operates to bar a consecutive period of physical confinement with respect to the lesser punishment for the assault offense.

Respondent argues that substantial evidence supports the juvenile court’s implicit determination that the attempted murder and assault were separate and distinct offenses. According to respondent, the attempted murder was complete before defendant jumped

from the platform and kicked Mr. Covarrubias as he lay on the tracks. The prosecutor's theory, respondent asserts, was that the attempted murder was the natural and probable consequence of the target offense of assault and that defendant committed a separate act of assault when he kicked Covarrubias. Defendant aided and abetted the target offense by joining a group of minors who disembarked from the train with the intent to assault Mr. Covarrubias. Defendant then joined the other minors in forming a "half-U formation" around Mr. Covarrubias before E.H. threw Mr. Covarrubias onto the tracks. At that point, respondent argues, the attempted murder was complete and defendant committed the separate offense of assault when he waited two minutes before jumping from the platform and kicking Mr. Covarrubias. Citing *People v. Gaio* (2000) 81 Cal.App.4th 919, 935, respondent contends that the separation of time between the two crimes gave defendant "sufficient opportunity to reflect upon his initial crime and reconsider his course of conduct."

Defendant's assault of Mr. Covarrubias was part of an ongoing dispute between defendant and his companions on the one hand, and Mr. Covarrubias on the other hand. The dispute began on the train and continued on the platform after the parties got off the train. Once off the train, defendant's and his companions surrounded Mr. Covarrubias, E.H. threw Mr. Covarrubias onto the train tracks, and defendant and R.S. jumped onto the tracks and stomped on and kicked Mr. Covarrubias. The acts of throwing Mr. Covarrubias on the tracks and then stomping on and kicking him were part of an indivisible course of conduct that constituted the attempted murder and assault. Accordingly, section 654 bars punishment for defendant's assault by means likely to produce great bodily injury enhancement. (*People v. Rodriguez, supra*, 47 Cal.4th at p. 507.)

We reject respondent's theory that the juvenile court impliedly found that the attempted murder was complete when E.H. threw Mr. Covarrubias onto the tracks and defendant committed a separate assault when he jumped onto the tracks two minutes later and stomped on Mr. Covarrubias. Instead, the only inference logically supported by the evidence, the prosecutor's arguments, and the juvenile court's rulings is that the juvenile

court found that defendant committed both the attempted murder and the assault when he kicked Mr. Covarrubias. As respondent argues, defendant testified that after E.H. threw Mr. Covarrubias onto the train tracks he (defendant) “stopped” for “about a couple of minutes” before he jumped onto the tracks. It is unlikely, however, that the juvenile court treated defendant’s testimony as other than a rough estimate in light of other, more precise, evidence. The platform surveillance video was equipped with a timing device that showed that E.H. threw Mr. Covarrubias onto the tracks at “213418” (i.e., 9:34:18 p.m.) and that defendant jumped onto the tracks 12 seconds later at “213430” (i.e., 9:34:30 p.m.).

The theory that the attempted murder was the natural and probable consequence of the target offense of assaulting Mr. Covarrubias was not the prosecutor’s only theory. In opposing defendant’s motion to dismiss the attempted murder charge at the close of the prosecution’s case, the prosecutor argued that defendant’s conduct of stomping on Mr. Covarrubias was an assault causing great bodily injury and could “in and of itself . . . be seen as attempted murder.” During closing argument, the prosecutor again argued that defendant committed assault by means likely to produce great bodily injury and attempted murder when he jumped from the platform and stomped on Mr. Covarrubias. The prosecutor argued, “Lifting your foot up and down on a person’s body, I think that is intent to kill that person.”

The juvenile court’s ruling that J.Y. did not commit attempted murder showed that it did not consider the attempted murder of Mr. Covarrubias complete when E.H. threw him onto the tracks. Up to the time that defendant jumped onto the tracks and stomped on Mr. Covarrubias, J.Y. was at least if not more culpable than defendant in the dispute with Mr. Covarrubias. The juvenile court, however, ruled that J.Y. did not commit attempted murder but that defendant did. Those rulings can be reconciled logically only by a determination that the juvenile court relied on defendant’s conduct in kicking Mr. Covarrubias to find attempted murder.

DISPOSITION

The adjudication order is modified to reflect that defendant's maximum period of physical confinement has been reduced from 13 years to 12 years, with the one-year maximum period of physical confinement for defendant's assault by means likely to produce great bodily injury adjudication stayed pursuant to section 654. The order is otherwise affirmed.

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MOSK, J.

I concur:

KRIEGLER, J.

I respectfully dissent. This is an issue of whether there is substantial evidence of separate intents. (*People v. McKinzie* (2012) 54 Cal.4th 1302, 1368; *People v. Osband* (1996) 13 Cal.4th 622, 730-731.) The minor testified the victim was thrown off the platform by other persons. The minor denied being involved in the decision to throw the victim on the tracks or the act of doing so. According to the minor, he stood on the platform for two minutes before jumping down to the tracks. During those two minutes, the minor testified he did nothing. The minor described what he did after the two minutes of standing on the platform, “I lightly stomped on his upper back.” The minor then admitted he ran from the scene of the two attacks on the victim. Thus, there is evidence the victim was thrown off the platform. And two minutes later, the minor jumped off the platform and stomped on the victim.

In *People v. Harrison* (1989) 48 Cal.3d 321, 335, our Supreme Court explained in connection with Penal Code section 654, subdivision (a) (section 654): “[T]he statute is intended to ensure that defendant is punished ‘commensurate with his culpability [citation], its protection has been extended to cases in which there are several offenses committed during ‘a course of conduct deemed to be indivisible in time.’ [Citation] [¶] It is defendant’s intent and objective, not the temporal proximity of his offenses, which determine whether the transaction is indivisible.” *Harrison* explained further that no purpose is served by distinguishing between defendants based upon the type or sequence of their offenses. (*People v. Harrison, supra*, 48 Cal.3d 338.) In *People v. Correa* (2012) 54 Cal.4th 331, 341, our Supreme Court described the facts in *Harrison*: “[T]he defendant broke into the victim’s home and committed three separate acts of digital penetration. After each penetration the victim was able to pull away. Twice the defendant was able to overpower her and penetrate her again. After the third assault she was able to retreat to a bathroom and lock the door. The entire episode lasted seven to 10

minutes.” In *Harrison*, our Supreme Court held that section 654 did not bar separate penalties for each violation of the same code section during a brief period. (*People v. Correa, supra*, 54 Cal.4th at p. 342; *People v. Harrison, supra*, 48 Cal.3d at p. 336.)

Harrison has been applied outside the sexual assault context to permit multiple sentences for crimes of violence occurring in close temporal proximity. In *People v. Trotter* (1992) 7 Cal.App.4th 363, 365-367, the defendant fired three shots at a police officer. The first shot was followed by a second shot. The second shot was fired one minute after the other. A third shot was fired seconds later. (*Id.* at p. 366.) Citing *Harrison*, the Court of Appeal upheld separate sentences against a section 654 challenge: “Defendant’s conduct became more egregious with each successive shot. Each shot posed a separate and distinct risk to Bledsoe and nearby freeway drivers. To find section 654 applicable to these facts would violate the very purpose for the statute’s existence. [¶] Furthermore, this was not a case where only one volitional act gave rise to multiple offenses. Each shot required a separate trigger pull. All three assaults were volitional and calculated, and were separated by periods of time during which reflection was possible. None was spontaneous or uncontrollable. ‘Defendant should . . . not be rewarded where, instead of taking advantage of an opportunity to walk away from the victim, he voluntarily resumed his . . . assaultive behavior.’” (*People v. Trotter, supra*, 7 Cal.App.4th at p. 368; see *People v. Latimer* (1993) 5 Cal.4th 1203, 1212 [discussing *Trotter* opinion’s analysis that each shot evinced a separate intent]; *People v. Jones* (2002) 103 Cal.App.4th 1139, 1147 [firearm possession by a felon within minutes of shooting into a residence separately punishable]; *People v. Washington* (1996) 50 Cal.App.4th 568, 578 [*Harrison* applies to non-sex offenses]; *People v. Surdi* (1995) 35 Cal.App.4th 685, 689 [applying *Trotter* in a multiple stabbing scenario]; 3 Witkin & Epstein, Cal. Criminal Law (4th ed. 2012) Punishment, § 284, p. 448.) The juvenile court could reasonably find the minor had sufficient time to contemplate his initial act of misconduct before jumping off the platform to commit a second crime. And the juvenile court could then hold that section 654 is inapplicable.

Further, section 654 is intended to permit greater punishment for more culpable offenders. (*People v. Kramer* (2002) 29 Cal.4th 720, 723-724; see *People v. Perez* (1979) 23 Cal.3d 545, 553.) Here, there is substantial evidence the minor had two minutes to contemplate what to do next before jumping down to the track to stomp on the victim. Pushing the teenage victim off the platform onto the tracks was an act of extraordinary moral culpability. Even leaving the victim laying on active rail tracks to be potentially run over by a train is a morally culpable act. But to then jump off the platform and stomp on the victim who was laying on the tracks is an act of even greater moral blameworthiness. The purpose of section 654, greater punishment in the face of more opprobrious culpability, is advanced under these circumstances. I would hold that section 654 does not apply here.

TURNER, P. J.